Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	)	CS Docket No. 97-80
	)	
Commercial Availability of Navigation Devices	)	
	)	
Compatibility Between Cable Systems and Consumer Electronics Equipment	)	PP Docket No. 00-67

JOINT REPLY OF THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, THE SONGWRITERS GUILD OF AMERICA, AND BROADCAST MUSIC, INC. TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

March 24, 2004

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To: The Commission

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THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION,
THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,
THE SONGWRITERS GUILD OF AMERICA, AND BROADCAST MUSIC, INC.
TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

The National Music Publishers' Association ("NMPA"), The American Society of Composers, Authors, and Publishers ("ASCAP"), The Songwriters Guild of America ("SGA"), and Broadcast Music, Inc. ("BMI") (hereinafter "Petitioners") filed a Petition for Reconsideration in the above-captioned proceedings (the "Cable Plug & Play Proceeding") on December 29, 2003 (the "Petition"), in which Petitioners requested, pursuant to 47 C.F.R. § 1.429, that the Federal Communications Commission (the "Commission") reconsider certain aspects of its Second Report and Order and Second Further Notice of Proposed Rulemaking ("Second R&O and FNPRM"), FCC 03-225 (Adopted: Sept. 10, 2003; Released, Oct. 9, 2003) in the above-captioned proceedings. Petitioners also filed a Petition for Reconsideration (collectively with the Petition in the above-captioned proceeding, the "Petitions") in the Broadcast Flag Proceeding (In the Matter of Digital Content Protection, MB Docket No. 02-230).

Various parties filed oppositions to the Petitions (the "Oppositions"), which Oppositions were due March 10, 2004. The following provides the response of the Petitioners to certain of the arguments made in those Oppositions. Although some of these arguments were made in the Cable Plug & Play Proceeding and others in the Broadcast Flag proceeding, the Petitioners herein address issues in both proceedings, given their relevance to the issues under consideration by the Commission in both of them. These points will be incorporated by reference into a Reply filed in the Broadcast Flag Proceeding.

1. There can be no question that theft of audio soundtracks is occurring.

Incredibly, the Business Software Alliance ("BSA") and Public Knowledge and Consumers Union (the "Consumer Groups") contend that there is no reason to be concerned about theft of audio soundtracks, stating that the music industry has presented no evidence of such theft. *E.g.*, Opposition of BSA in Broadcast Flag Proceeding at page 9; Opposition of the Consumer Groups in Cable Plug & Play Proceeding at page 8. As Petitioners have noted in their Petition, the Commission has premised this proceeding and the Broadcast Flag proceeding on the basis that it does not want the rampant piracy that exists with respect to music to be repeated with respect to audiovisual works. If the Commission accepts BSA's argument, logic would dictate that the Commission should simply terminate the Broadcast Flag proceeding and any consideration of piracy in any of its proceedings, including the Cable Plug & Play docket. The movie industry has not been required to present documented evidence of widespread theft of movies delivered over cable, although it does exist and it is growing. In fact, the movie industry has justified its reluctance to freely broadcast high definition content by citing the experience of the music industry with regard to widespread digital piracy. The same logic applies to the audio soundtrack.

2. The music industry proposal does not require a new encryption system solely for the audio channel.

Several parties contend that the Petition seeks a new encryption system solely for the audio channel, and that the Petition should be rejected on that ground. *E.g.,* Opposition of the Consumer Groups in Cable Plug & Play Proceeding at pages 8-9; Opposition of the Consumer Electronics Industry ("CEI") in Cable Plug & Play Proceeding at page 12 (referring to "some new encryption regime"); Opposition of the Home Recording Rights Coalition ("HRRC") in Cable Plug & Play Proceeding at page 11 (referring to Petitioners' proposal as a "crypto-compliance rule"); Opposition of National Cable & Telecommunications Association ("NCTA") in Cable Plug & Play Proceeding at pages 10-12 (referring to "an as-yet-undefined signal to turn off S/PDIF outputs"). This is incorrect.

No new proceeding is required. Petitioners have participated in both the Cable Plug & Play and Broadcast Flag Proceedings since the rules at issue were proposed by the Commission, and have offered ways to resolve their concerns throughout. Among the options suggested by Petitioners is their synchronous playback proposal, which merely tethers the audio to the video: where video copying, playback and distribution is permitted, the audio is too, as part of that audiovisual work.

With the synchronous playback proposal, the limitation is on functionality of the device, not on requiring encryption. Because the Petitioners' copyright protection "lite" does permit digital audio output to S/PDIF in the clear made in synchrony with the video playback, there is no encryption required and no "undefined signal" to turn off S/PDIF. The synchrony scheme is designed to inhibit ripping of the audio from the audiovisual work into a separate audio-only file.

On a related note, in response to the comment made by CEI in its Opposition that the substantive mandates are in the DFAST license, not the regulations, (Opposition of CEI at page 11), the Petitioners hereby submit that they are not **proposing that the F.C.C. mandate** an encryption technology for the audio soundtrack. Rather Petitioners' proposal would establish functional boundaries exactly analogous to Section 76.1904 of the proposed regulations, which establishes how much copying of the audiovisual work is permissible.

Furthermore, the argument made by HRRC in its Opposition that the proposed rule has an effect on the video channel and as a result, the Commission would have to scrap all of its work since 1998 (Opposition of HRRC, pg. 10) is incorrect. The proposed rule will not have an effect on the video channel.

3. The music industry's proposal will not render digital home theater audio systems useless.

The BSA and the Motion Picture Association of America ("MPAA") contend that the relief sought by Petitioners would cause a far worse "legacy" problem than would the protection that has already been given to video. Opposition of MPAA in Broadcast Flag Proceeding at pages 4-6; Opposition of BSA in Broadcast Flag Proceeding at page 9.

The contentions of BSA and MPAA about the music industry's proposed regulations about the synchronous playback proposal are wrong. Under the proposed regime, devices that play back the audio in synchrony with the video playback will be able to output the audio in digital form free and clear through S/PDIF. Thus, all arguments about "orphaned" digital audio home theater equipment are moot. It is the new product lines designed to provide music ripping and redistribution capabilities that will be most affected by the regulations.

On a related note, in response to the arguments made by CEI that the legacy numbers cited in the Petitions are too low (Opposition of CEI in Cable Plug & Play Proceeding at page 12) and MPAA's argument that Petitioners' concept of legacy problems is "misconceived" (Opposition of MPAA in Broadcast Flag Proceeding at page 6), the Petitioners note that the legacy numbers provided in the Petition are actually based on market studies conducted by the Consumer Electronics Association (the CEA, which is one of the two entities making up the CEI). None of the parties opposing the petition on the basis of inaccurate legacy numbers have cited any evidence except for unsupported assertions about "millions" of digital audio home theater equipment. In that regard, in footnote 5 of MPAA's Opposition, MPAA cites the fact that 32% of US households have a home theater system, yet MPAA does not break out the number of those that are purely digital, what their average price is, or any other information about digital home theater market penetration. BSA's citation of the number of Dolby AC-3 equipped receivers from the Dolby website is misleading because those statistics are for worldwide deployment, not the United States. (Opposition of BSA at page 9, containing reference to www.dolby.com/stats).

Finally, MPAA's assertion that the legacy digital television problem is quite small is contradicted by CEI. In its Opposition, CEI asserts that that Petitioners' estimate of legacy DTV devices is too low. According to CEI, the number should be around 14 Million units. (Opposition of CEI in Cable Plug & Play Proceeding at page 12).

4. <u>The music industry's proposal allows room for new business models.</u>

NCTA and the HRRC wrongly contend that the music industry's proposal allows no room for new business models. In addition, the opposition of HRRC states that the Petition asks

the Commission to provide the music industry with "unbridled power" over development of new business models. Opposition of NCTA in Cable Plug & Play Proceeding at pages 9, 12; Opposition of HRRC in Cable Plug & Play Proceeding at page 9.

Any business model involving the subsequent copying and distribution of music as a result of its transmission via cable or broadcast television requires a separate license -- in addition to the customary synchronization[1] and public performance rights -- from owners of the music copyrights. In order to provide incentives for companies to offer new services of this kind, there must be a workable licensing process, not an unregulated free-for-all based on pirating devices. In other words, for an industry participant to create a digital rights system that allows commerce in the music, there must be an incentive that will not exist if there is widespread piracy. The current success of the music industry in fostering many nascent digital distribution products and systems is testament to such an approach. The notion that the Commission should mandate a system that sanctions infringement upon the copyright owners' exclusive rights in order to prevent "unbridled power" is not consistent with copyright law, which confers these exclusive rights on authors and their assignees and licensees. If NCTA and HRRC have a complaint with copyright law, the Commission is the wrong forum in which to address it. The only "business model" that Petitioners seek to prevent is the one that relies on paying nothing for music: piracy. The effect of the Commission's action is to destroy the incentive for companies to invest in developing legitimate new business models.

5. The music industry is part of the "licensing chain" of the audiovisual work, and thus members of such industry have standing to object to the plug and play regulations.

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[1] A "synchronization license" is a license to make a copy of the underlying work or recording that synchronizes the music with the video.

CEI states that the position of the Petitioners relies on a fundamental misconception of the license chain for audiovisual content. Specifically, CEI contends that NMPA and its members are not among the licensors in that chain. Opposition of CEI in Cable Plug & Play Proceeding at page 11. This is simply wrong. In order to create the audiovisual work that includes a musical soundtrack, the creator of the audiovisual work must enter into a synchronization license with both the owner of the underlying work or song, and the owner of the sound recording embodying the production of the song. Once the audiovisual work is created, it can only be broadcast if a performance right in the music has been secured through a license. The MPAA and NCTA constituents, as users of the copyrighted music, hold the synchronization and public performance licenses that are granted by the constituents of NMPA, ASCAP, BMI, and SGA, among others. But these licenses do not include the right to make and distribute copies of the music. Therefore, each of the Petitioners is part of the licensing chain and has standing to object to uses of the copyrights that are outside the scope of the synchronization and public performance rights.

IV. Conclusion

The Petitioners request that the Commission grant the relief requested in the Petition.

Respectfully submitted,

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Date: March 24, 2004

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing were served on the following individuals on March 24, 2004, by first-class mail, postage prepaid:

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